

No. 82-1762

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

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TRUSTEES OF REX HOSPITAL, a Corporation;  
JOSEPH BARNES, and RICHARD URQUHART, JR.,  
v. *Cross-Petitioners,*

HOSPITAL BUILDING COMPANY,  
*Cross-Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

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**REPLY BRIEF FOR CROSS-PETITIONER**

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Dated: June 7, 1983

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**I. A Material Issue of Fact as to Standing Cannot Be  
Subsumed Into an Interrogatory Directed at Proximate  
Causation**

In its opposition to the conditional Cross-Petition for Certiorari, cross-respondent implicitly concedes the existence of a split in the Circuits on the question of whether the trial judge has discretion to submit an interrogatory to the jury on a material issue of fact once it has been decided to submit special interrogatories to the jury. *Compare* cases cited at 8-9 n.10 of Br. in Opp. *with* cases cited at 9-10 n.11 of Br. in Opp. Cross-respondent argues only that the jury instructions and Special Interrogatory No. 4 dealing with proximate causation subsumed the inquiry into preparedness and made a separate question unnecessary. Br. in Opp. at 8.

Cross-respondent does not address the fact that the question of preparedness, although relevant to the question of proximate causation, independently presents a separate and distinct material issue of fact as to the standing of plaintiff to sue for an injury to its business or property under the antitrust laws. *Hayes v. Solomon*, 597 F.2d 958, 973 & 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (dismissing claim for lack of preparedness because "injuries for which damages were awarded were not antitrust injuries"). The question is not whether plaintiff suffered injury, but whether the injury suffered was to its business or property within the meaning of Section 4 of the Clayton Act. *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-37 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966) (failure to show preparedness disposes of claim because plaintiff "was not injured in his business or property and thus could not make the showing necessary to obtain relief under § 4").

This distinct inquiry into whether plaintiff suffered an injury to its business or property cognizable under Section 4 and, therefore, had standing to sue is *not* fairly presented to the jury by the question, "Did the acts of defendants . . . substantially and proximately cause injury to the business of Plaintiff . . . ?" See Appendix to Cross-Petition at 2a; Int. No. 4. A separate and distinct material issue of fact that is dispositive in its own right cannot be withdrawn from the jury at the sole discretion of the trial court without creating a conflict with the express decisions of the Second, Fifth and Sixth Circuits cited by both cross-respondent and cross-petitioners.

## **II. Neither the Jury Nor the Fourth Circuit Considered the Effect of Any Blue Cross Policy in Determining Defendants' Liability for Antitrust Injury**

Cross-respondent's opposition to granting certiorari on this issue is predicated in large part upon the contention that a so-called "'secondary plan'" involving Blue Cross reimbursements "adversely affected Charter's ability to

finance an expansion by HBC." Br. in Opp. at 4-5 n.6. Cross-respondent states that the "delays and consequent lost profits HBC suffered 'flowed' directly from the market exclusion practices directed at HBC." Br. in Opp. at 11. Thus, cross-respondent suggests that the *Brunswick* test is satisfied when the alleged Blue Cross policy is considered in the *Brunswick* analysis. Br. in Opp. at 4.

This contention misconstrues the record because the issue of Blue Cross reimbursement was not put to the jury and was never considered by the Fourth Circuit in its analysis of *Brunswick*. Special Interrogatory No. 6 specifically limited the award of damages to defendants' opposition to plaintiff's application for a Certificate of Need.\* Accordingly, the decision of the Fourth Circuit was expressly limited to these "delaying tactics" and did not consider the effect of any Blue Cross policy under *Brunswick*. Appendix A to the Petition for Certiorari at 19a. Cross-respondent cannot raise arguments with respect to Blue Cross when the jury never passed on the issue in determining injury and damages.

Moreover, plaintiff's reliance upon the Fourth Circuit's characterization of the injury claimed as being "of the type the antitrust laws were intended to prevent" does not satisfy the inquiry mandated by *Brunswick*. Br. in Opp. at 12. As discussed in the Cross-Petition at 13-14, this limited inquiry squarely conflicts with the holdings of *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), and *Chrysler Corp. v. Fedders Corp.*, 643 F.2d

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\* Interrogatory No. 6 allowed the jury to award damages only if it answered "yes" to the following question: "Did the Acts committed by the defendants in connection with the Medical Care Commission's consideration of plaintiff's Certificate of Need application and/or in connection with the appeal to the Superior Court of Wake County constitute an abuse of the adjudicatory or judicial process which was part of a larger plan to violate the antitrust laws?" Appendix to Cross-Petition at 2a; Int. No. 6.

1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1980), because the Court of Appeals here failed to consider whether the injury alleged was in any way attributable to the breakdown in competitive conditions allegedly caused by the claimed violation. *See* Appendix A to the Petition for Certiorari at 19a.

### III. Conclusion

Cross-petitioners have established that the twin holdings of the Fourth Circuit on which certiorari is sought are in direct conflict with the holdings of other Circuit Courts of Appeal. The issues were squarely presented by the record before the Fourth Circuit when it articulated these erroneous legal principles. If cross-respondent's Petition for Certiorari is granted, the issue raised in the Cross-Petition for Certiorari should be heard by this Court as well.

Respectfully submitted,

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